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No. 98-436

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1998

JOHN H. ALDEN, *et al.*,

Petitioners,

v.

STATE of MAINE,

Respondent.

On Writ of Certiorari to the
Maine Supreme
Judicial Court

BRIEF OF *AMICUS CURIAE* NATIONAL ASSOCIATION OF POLICE ORGANIZATIONS IN SUPPORT OF PETITIONERS

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STATEMENT OF INTEREST OF *AMICUS CURIAE*

Amicus curiae National Association of Police Organizations, Inc. (hereafter "NAPO") submits this brief in support of the Petitioners, John H. Alden *et al.*[1] NAPO seeks to reverse the judgment of the Supreme Judicial Court of Maine, which had affirmed the trial court's dismissal of the Petitioners' claims, that the State violated their rights to overtime pay under the Fair Labor Standard Act ("FLSA"), 29 U.S.C. § 201, *et seq.*

NAPO is a national non-profit organization, representing state and local law enforcement officers in the United States. It is a coalition of police associations and unions that serves to advance the interests and legal rights of law enforcement officers through advocacy, education, and legislation. NAPO represents 4,000 law enforcement organizations, with over 220,000 sworn law enforcement officers (including police officers, deputy sheriffs, state troopers, highway patrol officers, and traffic enforcement personnel), and 3,000 retired officers. For example, NAPO represents the Connecticut State Troopers, the Minnesota State Troopers, and the New York State Troopers, among other state employees. NAPO's affiliate, the National Law Enforcement Officers' Rights Center of the Police Education and Research Project, advocates the fundamental due process and workplace rights of officers.

NAPO's members have a significant interest in the important issues of law before this Court and the impact of the Court's decision on law enforcement officers. First, FLSA § 7 obligates the States to compensate covered employees at premium rates for hours worked in excess of the applicable statutory threshold or, alternatively, allows the States to provide compensatory time under certain circumstances (with limitations as to maximum number of

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[1]Pursuant to Supreme Court Rule 37.6, no counsel for any party in this case authored this *amicus curiae* brief in whole or in part, and no person or entity, other than the *amicus curiae* and its members, made a monetary contribution to the preparation or submission of the brief.

hours). 29 U.S.C. § 207. And law enforcement employees are entitled to overtime pay under the special provisions that apply to such employees. 29 U.S.C. § 207(k). To ensure compliance, FLSA § 16(b) authorizes employee suits for monetary relief "against any employer (including a public agency) in any ... State court of competent jurisdiction."29 U.S.C. § 216(b). NAPO seeks to assure that State employees have a remedy to enforce their rights.

In view of this Court's decision in *Seminole Tribe v. Florida*, 517 U.S. 44, 116 S.Ct. 1114 (1996), state courts are now the only judicial forum available to state employees under the FLSA to bring actions to recover unpaid overtime compensation. If the decision of Maine's highest court is not reversed, state employees, including law enforcement officers, will effectively be denied any remedy to vindicate their rights under the FLSA or any other Federal statute enacted pursuant to Congress's Article I powers.

WRITTEN CONSENT OF THE PARTIES

NAPO has received the written consents of the Petitioners (from their counsel) and the Respondent State of Maine (from the Department of the Attorney General), pursuant to Supreme Court Rule 37.3(a). These letters of consent have been filed with the Clerk of the Court, as required by the rule.

STATEMENT OF THE CASE

The *amicus curiae* adopts the factual statement in the petition for a writ of certiorari, filed by the Petitioners in this case. What follows is a shorter narrative of the facts and proceedings.

In December 1992, John Alden and sixty-four Maine parole and probation officers filed suit in U.S. district court against the State of Maine to recover overtime pay to which they were entitled under the FLSA, 29 U.S.C. § 201, *et seq., supra*. The district court sustained their claim that they were "law enforcement" employees entitled to overtime pay. *Mills v. Maine*, 853 F.Supp. 551, 552 (D.

Me. 1994); 889 F.Supp. 3 (D.Me. 1993).

While this action was pending and before an award of any monetary relief, this Court decided *Seminole Tribe*, *supra*, which barred federal courts under the Eleventh Amendment from hearing Indian Gaming Regulatory Act claims against the States, or any other claims against the States arising under laws passed pursuant to Congress's Article I powers, unless the States sued waived sovereign immunity. Accordingly, the district court then dismissed the Petitioner officers' federal court action.[3]

Thereafter, in August 1996, the Petitioner officers filed this action in a state superior court, again alleging that the State had violated the FLSA overtime provisions. That court dismissed the officers' claim after the State invoked sovereign immunity. The officers appealed to the Maine Supreme Judicial Court.

That court, by a 4-2 panel vote, affirmed the superior court. It held that the Eleventh Amendment embodies state sovereign immunity and applies beyond the Amendment's literal terms to bar federal claims brought in state court, when those claims would be barred if brought in federal court. It ruled that Congress does not have the necessary power under the Constitution to subject the States to the overtime provisions of the FLSA in federal or state court. The Supreme Judicial Court also rejected the officers' contention that Maine discriminated against federal causes of action, in view of State statutes in which the State has made itself amenable to suit in the area of state employee wage claims; it ruled that no Maine statute authorized the precise state employee statutory cause of action stated in the officers' FLSA complaint.

This Court granted review on September 29, 1998.

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[3]This decision was affirmed on appeal. *Mills v. State of Maine*, 118 F.3d 37 (1st Cir. 1997).

SUMMARY OF ARGUMENT

First, under the FLSA, as upheld in *Garcia v. San Antonio Metropolitan Transit Authority, infra,* some of Maine's sovereign power has been divested from it through the extension of the FLSA protections to state employees and the authority to enforce those rights through an action in state court. Yet, the Maine court has effectively immunized its state agencies from FLSA claims, accomplishing indirectly what the San Antonio Metropolitan District Authority sought but failed to achieve in *Garcia*, that is, an exemption from FLSA coverage. In effect, the Maine court has nullified Congress's constitutional authority under Article I to enact enforcement legislation that provides public employees with a remedy when federal law is violated. Because *Garcia* ruled that state sovereignty is not adversely infringed upon by the application of the FLSA provisions, the State of Maine cannot validly invoke sovereign immunity and deny its own employees a forum for a federal cause of action under the FLSA.

By holding that state sovereign immunity under the Eleventh Amendment protects the state from FLSA causes of action in its own courts, the Maine Supreme Judicial Court has violated the spirit of *Garcia*, has unjustifiably elevated the Eleventh Amendment over the Tenth Amendment on state sovereignty grounds, and has left the Petitioners and other state employees without a private right of action to enforce a constitutionally valid federal law in any forum.

Second, the Eleventh Amendment does not apply to the jurisdiction of *state courts* to hear claims under federal law (enacted pursuant to Article I of the Constitution) against state governments, as this Court ruled in *Hilton v. South Carolina Pub. Ry. Comm'n, infra.* As interpreted in *Seminole Tribe*, the Eleventh Amendment addresses the susceptibility of a state to private suit in federal court, not the general immunity of a state from suit in state court, and therefore the rationale of *Seminole Tribe* does not apply here. Thus, Maine's expansion of the Eleventh Amendment's jurisdictional reach beyond Article III federal courts must fail.

In order to protect the State's treasury in this case, the Supreme Judicial Court of Maine has relied upon a faulty argument concerning the need for symmetry between federal and state courts, namely that Congress cannot force the states to defend in their own courts the same claims that cannot be heard in federal courts. To the contrary, applying the principle concerning symmetry set forth in *Hilton,* symmetry is not an imperative that must override just expectations by public employees as to their federal rights to overtime pay and a minimum wage and the predictability of receiving such compensation.

Third, it is the Supremacy Clause, not the Eleventh Amendment, which provides the crucial guidance for determining whether or not a federal cause of action can be heard in a state court. In *Howlett v. Rose*, *infra*, this Court stated unequivocally the general principle that Federal law, as the "Supreme Law of the Land", is enforceable in state courts. The only exception to this general rule is if the State has a neutral or valid excuse to refuse to hear the case, which does not substantially curtail the federal right.

Sovereign immunity is not considered a neutral and valid excuse for refusing to the hear a federal claim. Where a State court apparently evades federal law and discriminates against federal causes of action, on the basis of sovereign immunity, but has waived sovereign immunity to allow state claims by similarly situated plaintiffs to be heard against state government agencies, it violates the Supremacy Clause. Maine has enacted several laws conferring on state employees the right to bring actions to recover damages from the State, thus waiving Maine's common-law judicial doctrine of sovereign immunity. Thus, Maine's selective application of sovereign immunity to discriminate against federal claims is prohibited under the Supremacy Clause. In addition, Maine's invocation of sovereign immunity for the purpose of not paying the funds owed to its employees under FLSA has the effect of abrogating and nullifying the FLSA remedy available to those workers, because state court is the only forum now available, in reality, for affected employees to vindicate that right after *Seminole Tribe*. Thus, in this case, the nullification by Maine's courts of the

enforcement of FLSA's overtime protections by State of Maine employees directly violates the Supremacy Clause.

Maine's action violates the Supremacy Clause in another way. The Maine Superior Court's dismissal of Petitioners' FLSA claims stands as an obstacle to the accomplishment and execution of the full purposes and objectives of the Congress, a principle of preemption enunciated by this Court in *Hines v. Davidowitz*, *infra,* specifically, in this case, the enactment of the FLSA protections and remedies and their extension to public workers. Therefore, the Maine court's action is preempted by the Supremacy Clause, because it thwarts or conflicts with the FLSA and its enforcement.

The State of Maine's interest in this case, the reason for invoking sovereign immunity, is to *not* pay out additional funds from its treasury to its workers, reserving those funds for other purposes. On the other hand, it is the objective of the FLSA's overtime provisions to require that public agencies, as well as most private employers, pay their employees an overtime wage if they work over a certain number of hours. Following the principles enunciated by this court in *Hisquierdo v. Hisquierdo*, *infra*, and *McCarty v. McCarty*, *infra*, the recognition of Maine's sovereign immunity threatens grave harm to the clear and substantial federal interests set forth in the FLSA. And the consequence of Maine's effort to not pay additional wages sufficiently injures the objectives of the FLSA, so as to require nonrecognition by this Court. Affirming the Maine's Supreme Judicial Court's decision would elevate the State of Maine's interests over the federal interests, which would be a clear abrogation of the Supremacy Clause in the name of state sovereignty.

Hence, Maine's common law doctrine of sovereign immunity is preempted under the Supremacy Clause.

Fourth, affirming the decision of the Maine Supreme Judicial Court would send a signal to other States that they are free to refuse to hear private enforcement actions against state governments under the FLSA and are therefore able to nullify

Congress's extension of the FLSA coverage to all public employees. Allowing some States to effectively bar FLSA lawsuits by their employees, in order to escape the FLSA wage and overtime provisions, while other States allow such lawsuits, could have far-reaching and undesirable consequences. It would create disparate enforcement among the States, with individuals in those States invoking sovereign immunity facing an insurmountable obstacle in vindicating their Federal statutory rights. Significantly, other federal laws applicable to the States could be negatively impacted if this Court does not reverse the Maine court's decision. It is inconceivable that the uniformity of federal law and its application as the supreme law could long survive if the lower court's decision is allowed to stand.

For all of the above reasons, Maine state employees have a constitutional congressionally enacted right, under the FLSA, 29 U.S.C. § 216 (b), to bring a cause of action against the State of Maine in state court, and Maine's refusal to entertain those actions must be invalidated as unconstitutional.

ARGUMENT

I. Application of the Fair Labor Standards Act to the States and the provision for enforcement actions in state courts are valid exercises of Congress's authority under the Commerce Clause, Article I of the U.S. Constitution. In so doing, Congress has withdrawn or divested the States of some sovereignty under the Tenth Amendment, relevant to the scope of State sovereign immunity. Therefore, Maine must comply with the "overtime pay" provisions of the Fair Labor Standards Act, 29 U.S.C. § 207, and may be sued by state employees in a state court for alleged violations of this provision.

The Fair Labor Standards Act ("FLSA") of 1938, 29 U.S.C. §201, *et seq.*, was enacted to correct and eliminate labor conditions detrimental to the maintenance of the minimum standard of living necessary for the health, efficiency, and general well-being of workers. Fair Labor Standards Act Amendments of 1966 ("FLSAA

of 1966"), Legislative History, 89th Cong., 2nd Sess (1966) reprinted in 1966 U.S.C.C.A.N. 3002. The FLSA established a nationwide minimum wage rate for industries covered by its provisions and a maximum hours standard provision that provided for compensation of at least one and one-half times the regular hourly wage rate applied to all hours in excess of a certain specified number.

Since 1938, the FLSA has been amended several times and Congress has expanded its coverage. In order to extend the Act's coverage to the large groups of workers whose earnings were still unjustifiably and disproportionately low, the 1966 amendments extended the protection of the Act to employees employed in private activities which had theretofore been completely exempt from coverage, namely public employees employed in hospitals and related institutions, schools and institutions of higher education, and local transit operations. *See* FLSAA of 1974. The 1974 amendments completed this task and extended the Act's minimum wage and overtime coverage to almost all non-supervisory Federal, State, and local government employees, including "employees of States, political subdivisions of states, and interstate governmental agencies." *Id.* In addition, the 1974 amendment to FLSA § 16(b) clarified that FLSA suits by public employees may be maintained in a "federal or state court."[4] Previously, this provision had not specified the courts in which such cases could be brought.

The impetus of this later amendment was the Supreme Court's decision in *Employees v. Missouri Public Health Dept.* 411 U.S. 279, 93 S.Ct. 1614, (1973). There, the Court held that, in enacting the 1966 amendments, Congress had not explicitly

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[4]"Any employer who violates the provisions ... of this title shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, ... An action to recover the liability prescribed in either of the preceding sentences may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by one or more employees for and in behalf of himself or themselves and other employees similarly situated." 29 U.S.C. § 216(b).

provided that "newly covered State and local employees could bring an action against their employer in a Federal court under section 16." FLSAA of 1974. While observing that Congress did not intend to deprive a State of its constitutional immunity to suit by its employees in a federal forum, the Court stated that public employees could bring suit in state court and sovereign immunity could not block such suits:

> ... Congress has the power to lift the State's common-law immunity from suit insofar as that immunity conflicts with the regulatory authority conferred upon it by the Commerce Clause. Congress has done so with respect to these state employees in its 1966 amendments to the FLSA; by those amendments, Congress created in these employees a federal right to recover from the State compensation owing under the Act. While constitutional limitations upon the federal judicial power bar a federal court action by these employees to enforce their rights, the courts of the State nevertheless have an independent constitutional obligation to entertain employee actions to enforce those rights. [Citations omitted.]

411 U.S. at 297-298.

Therefore, in summary, the 1966 and 1974 amendments to the FLSA extended the minimum wage and maximum hour provisions of the Act to all public employees (certain limited categories exempted) and, provided private litigants with a remedy for employers' (including States) violations of the Act, by allowing suits in either federal or state court.

In *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 105 S.Ct. 1005, 83 L.Ed.2d 1016 (1985), this Court held that Congress possessed the authority to impose the requirements of the FLSA on state and local governments. In that case, this Court stated that "Congress' action in affording the San Antonio Metropolitan Transit Authority (SAMTA) employees the

protections of the wage and hour provisions of the FLSA contravened no affirmative limit on Congress' power under the commerce Clause." 465 U.S. at 556. In enacting the FLSA, Congress acted within its Article I powers and did not violate the Tenth Amendment by providing state employees with the protections afforded by the FLSA.[5] *See id.* at 555-556.

It is well established that each State is a sovereign entity in our federal system and that "[i]t is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent." *Hans v. Louisiana,* 134 U.S. 1, 10 S.Ct. 504, 506 (1890). However, state sovereignty is limited by the Constitution itself. In *Garcia,* this Court stated:

> A variety of sovereign powers, for example, are withdrawn from the States by Article I, §10. Section 8 of the same Article works an equally sharp contraction of state sovereignty by authorizing Congress to exercise a wide range of legislative powers and (in conjunction with the Supremacy Clause of Article VI) to displace contrary state legislation. [citation omitted]. By providing for final review of questions of federal law in this Court, Article III curtails the sovereign power of the States' judiciaries to make authoritative determinations of law. [citation omitted].

469 U.S. at 548-549.

While the States retain a significant degree of sovereign authority and may invoke the common law doctrine of state sovereignty to bar lawsuits against them, the power of state sovereignty is valid "only to the extent that the Constitution has not divested them (the states) of their original powers and transferred

[5]"The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved for the States respectively, or to the people." U.S. CONST. AMEND. X.

those powers to the Federal government." *Id.* at 549. As stated by James Madison to the Members of the First Congress: "Interference with the power of the States was no constitutional criterion of the power of Congress. If the power was not given, Congress could not exercise it; if given, they might exercise it, although it should interfere with the laws, or even the constitution of the States." *Id.* (quoting 2 Annals of Cong. 1897 (1791)). Generally, the "Constitution does not carve out express elements of state sovereignty that Congress may not employ its delegated powers to displace." *Id.* Thus, in *Garcia,* this Court concluded that the provisions of the FLSA did not unconstitutionally encroach on state sovereignty, because some sovereignty had been withdrawn or divested by the 1974 amendment subjecting the States to the FLSA:

> Insofar as the present cases are concerned, then, we need go no further than to state that we perceive nothing in the overtime and minimum-wage requirements of the FLSA, as applied to SAMTA, that is destructive of state sovereignty or violative of any constitutional provision. SAMTA faces nothing more than the same minimum-wage and overtime obligations that hundreds of thousands of other employers, public as well as private, have to meet.

469 U.S. at 554.

Under *Garcia,* some of Maine's sovereign power or sovereignty has been withdrawn or divested from it by the application of the FLSA to its state employees and the enforcement of FLSA rights through a private damage action in state court.[6]

By holding that state sovereign immunity under the Eleventh

[6]That said, it must be noted that in the interest of compromise and accommodation, Congress has accorded the States more flexibility than that given to the private sector. FLSA § 7, 29 U.S.C. 207(o), allows states to provide compensatory time off, in lieu of overtime compensation, not to exceed a certain number of hours, pursuant to agreements or understandings with the employees.

Amendment protects the state from FLSA causes of action in its own courts, the Maine Supreme Judicial Court has done the following: It has violated the spirit of *Garcia*, has unjustifiably elevated the Eleventh Amendment over the Tenth Amendment on state sovereignty grounds, and has left the Petitioners and other state employees without a private right of action to enforce a constitutionally valid federal law, because this Court's decision in *Seminole Tribe*, *supra* precludes a FLSA private damages action in federal court. In effect, the Maine court has rejected Congress's enactment (under Article I powers) of enforcement legislation that provides public employees with a remedy when federal law is violated.[7] In other words, the Maine court has effectively immunized state agency employers from FLSA claims, accomplishing indirectly what the San Antonio Metropolitan District Authority sought but failed to achieve in *Garcia*, that is, exemption from FLSA coverage. Because the FLSA's application does not adversely infringe on its sovereignty, the State of Maine cannot validly invoke sovereign immunity and deny its employees a forum for a federal cause of action.

II. The Eleventh Amendment of the U.S. Constitution does not apply to causes of action to enforce federal law brought in state court, and thus a state court may not refuse to hear such a federal claim on sovereign immunity grounds in reliance on that amendment. The ruling in *Seminole Tribe* restricts only the judicial power of federal courts under Article III to hear private lawsuits against unconsenting states brought under laws enacted pursuant to Article I of the U.S. Constitution.

In *Seminole Tribe, supra*, this Court held only that the Eleventh Amendment invalidates or renders inoperative statutory provisions

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[7]The injunctive relief provision of the FLSA, § 217, gives federal district courts jurisdiction to restrain violations of § 215(a)(2). Under this provision, the district courts have the ability to restrain through equitable relief any withholding of payment of minimum wages or overtime compensation found by the court to be due to employees. 29 U.S.C. § 217. After *Seminole Tribe,* the injunctive relief provision of the FLSA is no longer available.

passed under Article I of the Constitution, which subjects a State to suit in federal court if the State invokes sovereign immunity. The Court concluded that Congress lacked authority under any powers in Article I to abrogate the States' Eleventh Amendment immunity in federal court. 517 U.S. at 44. The Court stated that the Eleventh Amendment reflects "the fundamental principle of sovereign immunity [that] limits the grant of [federal] judicial authority in Article III. *Id.* at 63, 116 S.Ct. 1127-1128 (quoting *Pennhurst State School and Hospital v. Halderman,* 465 U.S. 89, 97-98, 104 S.Ct. 900 (1984)). Therefore, the court determined that Congress had exceeded its Article I powers by seeking to expand the jurisdiction of Article III federal courts beyond the limits imposed by the Eleventh Amendment.[8]

The Maine Supreme Judicial Court's expansion of *Seminole Tribe* and the protection afforded States in federal court is erroneously misplaced because a Maine Superior court is not an Article III court. *Alden v. State*, 715 A.2d 172 (1998) (Dana, J., dissenting). As this Court has stated, "[T]he Eleventh Amendment does not apply in state courts". *Id.*, quoting *Hilton v. South Carolina Pub. Ry. Comm'n,* 502 U.S. 197, 205, 112 S.Ct. 560, (1991); *Will v. Michigan Dept. of State Police,* 491 U.S. 58, 63-64, 109 S.Ct. 2304, 2308 (citing *Maine v. Thiboutot,* 448 U.S. 1, 9 n. 7, 100 S.Ct. 2502, 2507, n.7, (1980)); *Nevada v. Hall,* 440 U.S. 410, 420-421, 99 S.Ct. 1182, 1188-1189, (1979). *See also Bunch v. Robinson,* 712 A.2d 585 (Md.Ct.Spec.App. 1998) ("The Eleventh Amendment addresses the susceptibility of a state to suit in federal court, not the general immunity of a state from private suit.").

In *Hilton*, this Court held that the Federal Employers' Liability Act ("FELA") created a cause of action against state-owned railroads in state court. 502 U.S. at 199. Hilton, an

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[8]"The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subject of any Foreign State." U.S. CONST. AMEND. XI.

employee of the South Carolina Public Railways commission, filed a FELA claim in federal court for an injury caused by the commission's alleged negligence. While this case was pending, the Supreme Court announced its decision in *Welch v. Texas Dept. of Highways and Public Transportation,* 483 U.S. 468, 107 S.Ct. 2941, 97 L.Ed.2d 389 (1987), which held that the Jones Act did not abrogate the States' Eleventh Amendment immunity. Because the Eleventh Amendment immunity from the Jones Act suit would also apply to FELA suits, Hilton dismissed his federal court claim and refiled his FELA suit in state court. 502 U.S. at 199. The state trial court dismissed Hilton's complaint on the ground that "FELA does not authorize an action for money damages against an agency of the State, even if suit is maintained in a state forum." *Id.* at 200.

In holding that FELA does authorize causes of action against the States in their courts and in rejecting the argument that the *Welch* decision was controlling, this Court stated in *Hilton*:

> Welch is not controlling here. The characterization of Welch is inaccurate because the most vital consideration of our decision today, which is that to confer immunity from state-court suit would strip all FELA and Jones Act protection from workers employed by the States, was not addressed or at all discussed in the Welch decision. Indeed, that omission can best be explained by the assumption, made express in the concurring opinion of Justice WHITE, that the Jones Act (and so to FELA by its terms) extends to the States. This coverage, and the jurisdiction of state courts to entertain a suit free from Eleventh Amendment constraints, is a plausible explanation for the absence in Welch of any discussion of the practical adverse effects of overruling that portion of Parden which pertained only to the Eleventh Amendment, since continued state-court jurisdiction made those effects minimal.

502 U.S. at 204. "... [A]s we have stated on many occasions, 'the

Eleventh Amendment does not apply in state courts.' [Citations omitted.]" *Id.* at 204-205.

Conferring immunity on Maine from suits in its courts would basically eliminate any private right of action by state employees against their employers under the FLSA. Justice White's reasoning in *Hilton* clearly applies to the Petitioners and their claims in this case. Their FLSA rights to overtime pay would be effectively stripped away if this Court affirms the Maine court's decision. Thus, allowing suit in state court serves to ameliorate the adverse effect of *Seminole Tribe's* holding forbidding a private right of action against the State in federal court.

In order to protect the State's treasury in this case, the Supreme Judicial Court of Maine has relied upon a faulty argument concerning the need for symmetry between federal and state courts, in its effort to extend the Eleventh Amendment's jurisdictional reach beyond Article III courts. As the Maine court stated:

> If Congress cannot force the states to defend in federal court against claims by private individuals, it similarly cannot force the states to defend in their own courts against these same claims. In reaching this conclusion, we have found that the Eleventh Amendment and state sovereign immunity are analogous, to the extent that both protect the State from being forced by an act of Congress to defend against a federal cause of action brought by a private individual.

Alden, 715 A.2d at 174. However, the dissent in *Alden*, relying on *Hilton*, argued that the majority "accords symmetry undue weight." *Id.* at 177 (Dana, J., dissenting). Although the scope of Eleventh Amendment immunity is a valid consideration, it is not controlling. As stated in *Hilton*:

> The resulting symmetry, making a State's liability or immunity, as the case may be, the same in both federal and state courts, has much to commend it.

> ... But symmetry is not an imperative that must override just expectations which themselves rest upon the predictability and order of stare decisis.

502 U.S. at 206.

In summary, the Eleventh Amendment does not define the scope of a State's common law sovereign immunity in its own courts. Although the Eleventh Amendment removes the Article III jurisdiction of federal courts to hear federal law claims against state governments, the Eleventh Amendment does not apply to the jurisdiction of state courts. And, therefore, the Petitioners have a constitutional congressionally enacted right, under the FLSA, 29 U.S.C. § 216 (b), to bring a cause of action against the Respondent in state court.

As discussed in the next section of this brief, the Supremacy Clause provides the crucial guidance for determining whether or not a federal cause of action can be heard in a state court.

III. Under the Supremacy Clause of the U.S. Constitution, state courts are required to hear claims arising under federal law, with very limited exceptions. The Supremacy Clause overrides the State of Maine's assertion of sovereign immunity and consequent Maine court refusals to entertain a cause of action by state employees to vindicate and enforce a right expressly conferred by the Fair Labor Standards Act. Affirming the decision below, barring an action brought by Maine state employees for violations of the FLSA, would effectively nullify that federal statute. It would disable the well-established principle that the laws of the United States are laws of the States and binding on *all* courts, with significant consequences for our system of government.

Article VI, Clause 2 of the United States Constitution, known as the "Supremacy Clause", provides, in pertinent part:

> This Constitution, and the laws of the United States

> which shall be made in pursuance thereof ... shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any state to the contrary notwithstanding.

This Court has interpreted and applied this provision to prevent State courts from refusing to hear Federal claims, and also to override or "pre-empt" State laws, including common law, which thwarts the administration or execution of Federal law.

A. Under the Supremacy Clause, state courts of general jurisdiction cannot discriminate against and are therefore obligated to hear Federal claims, with very limited exceptions, especially (but not exclusively) if state courts of general jurisdiction would hear state law claims brought by the same or similarly situated plaintiffs against the State under some form of waiver of sovereign immunity.

Beginning in 1876, with *Claflin v. Houseman, Assignee*, 93 U.S. 130, 23 L.Ed. 833, followed by *Mondou v. New York, N.H. & H.R. Co.*, 223 U.S. 1, 32 S.Ct. 169 (1912), *Testa v. Katt*, 330 U.S. 386, 67 S.Ct. 810 (1947), and, most recently, by *Howlett v. Rose*, 496 U.S. 356, 110 S. Ct. 2430 (1990), this Court has repeatedly rejected efforts by state courts to dismiss federal law claims on the grounds that state courts have no obligation to hear federal claims, because of either a disagreement with the federal claim or a refusal to recognize the superior authority of its source.

In *Mondou*, this Court held that rights arising under a Federal statute enacted pursuant to the Commerce Clause may be enforced in state courts when their jurisdiction, as prescribed by local laws, is adequate to the occasion.

> The suggestion that the act of Congress is not in harmony with the policy of the state, and therefore that the courts of the state are free to decline

> jurisdiction, is quite inadmissible, because it presupposes what in legal contemplation does not exist. When Congress, in the exertion of [its constitutional power] adopted that act, it spoke for all the people and all the states, and thereby established a policy for all. That policy is as much the policy of Connecticut as if the act had emanated from its own legislature, and should be repeated accordingly in the laws of the state.

223 U.S. at 57.

In *Howlett*, this Court stated unequivocally the general principle that Federal law, as the "Supreme Law of the Land", is enforceable concurrently in state courts. "The Supremacy Clause ... charges state courts with a coordinate responsibility to enforce that [federal] law according to their regular modes of procedure." 396 U.S. at 367. There, a former high school student brought a § 1983 civil rights action in a Florida state court against a school board and officials for violation of his constitutional rights. That court dismissed the action against the school board on sovereign immunity grounds, and a state appellate court upheld that dismissal. This Court held that the state court's refusal to entertain such claims against a school district, when state courts would have allowed state law claims by the same plaintiff to be heard against the same defendants, violated the Supremacy Clause. This Court unanimously reversed and found that the state court was apparently evading federal law and discriminating against federal causes of action, because sovereign immunity would not have barred a claim under state law.

> Respondents have offered no neutral or valid excuse for the [Florida] Circuit Court's refusal to hear § 1983 actions against state entities. The Circuit Court would have had jurisdiction if the defendant were an individual officer and the action was based on § 1983. It would also have had jurisdiction over the defendant school board if the action were based on established

> state common law or statutory law. A state policy that permits actions against state agencies for the failure of their officials to adequately police a parking lot and for the negligence of such officers in arresting a person on a roadside, but yet declines jurisdiction over federal actions for constitutional violations by the same persons can be based only on the rationale that such persons should not be held liable for § 1983 violations in the courts of the State. That reason ... flatly violates the Supremacy Clause.

Id. at 380-81.

Howlett set forth the following principles and stated that they "are fundamental to a system of federalism in which the state courts share responsibility for the application and enforcement of federal law." 496 U.S. at 372. *First*, state courts may not disassociate themselves from federal law because of policy or other disagreements with the law or because of a refusal to recognize the superior authority of the source of the law, the Congress and its authority under the Constitution. *Second*, state courts have a duty to exercise jurisdiction and may not deny a federal right in the absence of a "valid excuse", when the parties and controversy are properly before it. *Third*, state courts may not be obligated to entertain Federal claims, however, if they refuse jurisdiction because of a neutral state rule regarding the administration of the courts--lacking a court of competent jurisdiction, for example--or the application of a neutral procedural rule. In only three cases involving narrow non-discriminatory applications of state procedural or jurisdictional rules has this Court found "valid excuses" for state court refusals to entertain a federal claim. *Id.* at 374-75. Not one of those limited excuses or exceptions applies in the instant case. Moreover, even an apparently neutral rule, on its face, can be preempted if it severely curtails the Federal remedy.

Felder v. Casey, 487 U.S. 131 (1988).[9]

In addition, *Howlett* soundly rejected, as a violation of the Supremacy Clause, the Florida court's reasoning concerning the invocation of sovereign immunity. (The Eleventh Amendment was not an issue, because, as in *Hilton*, the action was in state court.) In its conclusion, this Court discussed the serious consequences of nullifying federal laws, as follows:

> Respondents' argument that Congress did not intend to abrogate an immunity with an ancient common-law heritage [*i.e.* sovereign immunity] is the same argument, in slightly different dress, as the argument that we have already rejected that the States are free to redefine the federal cause of action. ... But as to persons that Congress subjected to liability, individual States may not exempt such persons from federal liability by relying on their own common-law heritage. If we were to uphold the immunity claim in this case, every State would have the same opportunity to extend the mantle of sovereign immunity to "persons" who would otherwise be subject to § 1983 liability. States would then be free to nullify for their own people the legislative decisions that Congress has made on behalf of all the people.

496 U.S. at 383. In *Employees v. Missouri Public Health Dept*, *supra*, Justice Marshall stated in a concurring opinion:

> The common-law doctrine of sovereign immunity in its original form stood as an absolute bar to suit against a State by one of its citizens, absent consent. But that doctrine was modified pro tanto in 1788 to the extent that the States relinquished their sovereignty to the Federal Government. At the time our Union was formed, the States, for the good of the whole, gave certain powers to Congress, including power to regulate commerce, and by so doing, they simultaneously subjected to congressional control that portion of their pre-existing common-law sovereignty which conflicted with those supreme powers given over to Congress. This is one of the essential lessons of the decision in Parden v. Terminal R. Co., 377 U.S. 184, 192 (1964), ... Congress having validly exercised its power under the Commerce Clause to extend the protection of the FLSA to state employees such as petitioners, [citation omitted], the State may not defeat this suit by retreating behind its common-law shield of sovereign immunity.

411 U.S. at 288-89. That principle is the one which this Court is now asked to reaffirm.

Howlett is directly germane to the present case, as Maine seeks to nullify the enforcement of a Federal statute in its courts of general jurisdiction. Petitioner John Alden and other state employees filed this action in the Maine Superior Court, a court of general jurisdiction competent to hear this case. That court dismissed his action when the State of Maine invoked the doctrine of sovereign immunity. Yet, Maine has enacted several laws conferring on state employees the right to bring actions to recover damages from the State, thus waiving Maine's common-law judicial doctrine of sovereign immunity.[10]

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[9]*Felder* stands for the proposition that where such a rule conflicts with the purpose or effect of a Federal remedial objective, it can be preempted. There, a Wisconsin "notice of claim" statute, requiring notice of a claim by the potential plaintiff to a state agency, a 120 day claim consideration period before filing a lawsuit, and a six month statute of limitations after the agency's decision, was preempted in a § 1983 case because of the rule's conflict with the purpose and effects of the Federal law.

[10]The State of Maine is subject to suit by its employees under the following statutes: Maine Wage Statute, 26 M.R.S.A. §§ 664, 670; Maine Whistle Blower Statute, 26 M.R.S.A. § 833; Maine Family Medical Leave Act, 26 M.R.S.A. § 884; Maine Human Rights Act, 5 M.R.S.A. § 4551 *et seq.*; Maine Workers Compensation Act, 39-A M.R.S.A. § 101 *et seq.*

It does not matter that Maine has not enacted a law giving state employees the right to sue for overtime pay. *Howlett* was not predicated on a "similarity-of-claim"test, but focused more on the right of the plaintiff or persons similarly situated to bring a state claim damage action in state courts against the same or similarly situated government agencies or officials. *Howlett* specified two types of claims which could be brought in Florida's court, as examples, to illustrate the incongruity of Florida not allowing a § 1983 federal claim to go forward. Thus, there is no pre-requisite that there be an exactly parallel cause of action existing in state law for the same alleged violation as the federal violation; in fact, that may be highly unlikely given the determination by the Congress that a federal remedy was required (here, the FLSA protections for state employees).

The Arkansas Supreme Court recently addressed the very same issue before this Court. In *Jacoby v. Arkansas Department of Education*, 331 Ark. 508, 962 S.W. 2d 773 (1998), state employees filed a FLSA action against a state agency in state court. In a carefully analyzed and reasoned opinion, the Arkansas Supreme Court held, first, that the Eleventh Amendment does not provide the State of Arkansas with sovereign immunity from FLSA claims in state courts, relying heavily on *Hilton* and also *Howlett*, and, second, that under the Supremacy Clause the State is not immune from suit in state court for FLSA claims. The court concluded:

> In sum, we have no doubt that the weight of authority favors the employees in this matter. The FLSA now remains to be enforced against state employers only in state courts and is viable only be virtue of the Supremacy Clause. Despite our conclusion, we do not view our decision today as supporting the concept that Congress has unbridled authority under the Commerce Clause to require state courts to enforce federal rights against a state government. But with the history of the FLSA and with the Court's clear message that the Eleventh Amendment is not pertinent to state immunity in state courts, we can only conclude that the FLSA remains alive and well and that state-court enforcement against its own sovereign has not been foreclosed.

962 S.W.2d at 778.

Thus, in this case, the nullification by Maine's courts of the enforcement of FLSA's overtime protections through a lawsuit by Maine state employees directly violates the Supremacy Clause.

B. Under the Supremacy Clause, the Fair Labor Standards Act (FLSA) preempts any State law, both statutes and common law (including state sovereign immunity), which thwarts or stands as an obstacle to the judicial enforcement of the rights expressly guaranteed public employees by the FLSA.

The judicial concept of preemption derives from the Supremacy Clause. That clause invalidates state laws that "interfere with, or are contrary to the laws of the Congress, ..." *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 211, 26 L.Ed. 23 (1824). Even when Congress has not explicitly or implicitly preempted state law in a regulatory statute, preemption may occur to the extent that state and federal law actually conflict. And when the mandates of federal law and state law are not consistent or otherwise conflict, the state law must yield. *Wisconsin Public Intervenor v. Mortier*, 501 U.S. 597, 111 S.Ct. 2476 (1991).

Furthermore, the doctrine applies equally to state common law and state statutory law. *Chicago & N.W. Transp. Co. V. Kalo Brick & Tile Co.*, 450 U.S. 311, 101 S.Ct. 1145 (1988).[11] Therefore, Maine's common law of sovereign immunity is considered a state law and may be preempted.

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[11] *See Cleveland v. Piper Aircraft Corporation*, 985 F.2d 1438 (10th Cir. 1993), *Gorton v. American Cyanamid Company*, 194 Wis.2d 203, 533 N.W.2d 746 (1995), and *Feldman v. Lederle Laboratories, etc.*, 125 N.J. 117, 592 A.2d 1176 (1991).

Under *Free v. Bland*, 369 U.S. 663, 666 , 82 S.Ct. 1089 (1962), the relative importance of the state law is not relevant to the analysis of whether that law is preempted by federal law.

> The relative importance to the State of its own law is not material when there is a conflict with a valid federal law, for the Framers of our Constitution provided that the federal law must prevail. Article VI, Clause 2. ... Thus our inquiry is directed toward whether there is a valid federal law, and if so, whether there is a conflict with state law.

369 U.S. at 666. *See* also *Ridgway v. Ridgway*, 454 U.S. 46, 54-55, 202 S.Ct. 49 (1962), and *Felder*, 487 U.S. at 138.

Federal law preempts state law when the objectives and purpose of the federal law are thwarted by state law. As this Court stated in *Brown v. Hotel Employees & Bartenders Int'l Union Local 54*, 468 U.S. 491, 104 S.Ct. 3179 (1984):

> Even in the absence of such express language [in a statute] or implied congressional intent to occupy the field, we may nevertheless find state law to be displaced to the extent that it actually conflicts with federal law. Such actual conflict between state and federal law exists ... when state law "stands as an obstacle to the accomplishment and execution of the full purposes of Congress." Hines v. Davidowitz, 312 U.S. 52, 67, 61 S.Ct. 399, 404 (1941) .

Brown, 468 U.S. at 501. See also *Mortier*, 501 U.S. at 605. In *Hines*, this Court discussed the meaning of "obstacle" and "conflict", in preempting a Pennsylvania law regulating aliens:

> This Court, in considering the validity of state laws in the light of treaties or federal laws touching the same subject, has made use of the following expressions: Conflict; contrary to; occupying the field; repugnance;

> difference; irreconcilability; inconsistency; violation; curtailment; and interference. ... In the final analysis, there can be no crystal clear distinctly marked formula. Our primary function is to determine whether, under the circumstances of this particular case, Pennsylvania's law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.[20] [FN20. Cf. Savage v. Jones, 225 U.S. 501, 533, 32 S.Ct. 715, 726: 'For when the question is whether a Federal act overrides a state law, the entire scheme of the statute must, of course, be considered, and that which needs must be implied is of no less force than that which is expressed. If the purpose of the act cannot otherwise be accomplished--if its operation within its chosen field must be frustrated and its provisions be refused their natural effect--the state law must yield to the regulation of Congress within the sphere of its delegated power.]

312 U.S. at 67-68.

In determining whether a state law stands as such an obstacle, this Court and other courts have developed formulations and methods of analysis. For example, in *Dewey v. R.J. Reynolds Co.*, 121 N.J. 69, 577 A.2d 1239 (1990), the New Jersey Supreme Court relied upon *Hines* and explained this doctrine of preemption by "actual conflict". It stated:

> In contrast to express and implied preemption, the "actual conflict" analysis is "more an exercise of policy choices by a court than strict statutory construction" Abbot v. American Cyanamid Co., 844 F.2d 1108 (4th cir. 1988). The test is straightforward: first, a court must consider the purposes of the federal law, and second, it must evaluate the effect of state law on those purposes. Finberg v. Sullivan, 634 F.2d 50, 63 (3rd Cir. 1980). ...

577 A.2d at 1247.

In cases where the application of state property laws and federal benefits laws conflict, this Court has adopted an "injury and non-recognition" formulation. In *Hisquierdo v. Hisquierdo*, 439 U.S. 572, 99 S.Ct. 802 (1979), this Court stated:

> The pertinent questions are whether the [state law] right as asserted conflicts with the express terms of federal law and whether its consequences sufficiently injure the objectives of the federal program to require nonrecognition.

439 U.S. at 583. Just over two years later, this Court examined once again the conflict between California's community property law and a federal law regulating retirement benefits, relying upon the *Hisquierdo* formulation. Its decision in *McCarty v. McCarty*, 453 U.S. 210, 101 S.Ct. 2728 (1981), stated:

> We conclude, therefore, that there is a conflict between the terms of the federal retirement statutes and the community property right asserted by appellee here. But "[a] mere conflict in words is not sufficient"; the question remains whether the "consequences [of that community property right] sufficiently injure the objectives of the federal program to require nonrecognition." Hisquierdo, 439 U.S., at 581-583. This inquiry, however, need be only a brief one, for it is manifest that the application of community property principles to military retired pay threatens grave harm to "clear and substantial federal interests." See United States v. Yazell, 382 U.S., at 352.

453 U.S. at 232.

There is an analogy between *Hisquierdo/McCarty* and the instant case. In those cases, the State of California sought through

its law to decide how retirement benefits would be apportioned to spouses, while the U.S. Government followed different formulas, apparently to maintain employee morale in one case and to replenish a retirement fund in the other case. Here, the State of Maine's interest in this case, the reason for invoking sovereign immunity, is to *not* pay out additional funds from its treasury to its workers, reserving those funds for other purposes. On the other hand, it is the objective of the FLSA's overtime provisions to require that public agencies, as well as most private employers, pay their employees additional pay if they work over a certain number of hours, in order to promote other objectives, such as fairness and an incentive to hire more workers.

Under the above "actual conflict analysis" formulations, the Maine court's action is preempted by the Supremacy Clause. Clearly, recognition of Maine's sovereign immunity threatens grave harm to the clear and substantial federal interests set forth in the FLSA. And the consequences of Maine's effort to not pay additional wages sufficiently injures the objectives of the FLSA, as to require nonrecognition by this Court. Clearly, Maine's and any other State's invocation of sovereign immunity for the purpose of not paying funds owed to their workers under federal law has the effect of abrogating and nullifying the remedy available to those workers under the FLSA, because state court is the only forum now available to vindicate that right after *Seminole Tribe* (except for sporadic Labor Department enforcement actions, discussed below).

In summary, Maine's action stands as an obstacle to the accomplishment and execution of the full purposes and objectives of the Congress, first, in enacting the FLSA protections and the remedies to enforce them and, second, in extending those rights to public workers through the 1966 and 1974 amendments. Hence, this Court should find that Maine's common law doctrine of sovereign immunity is preempted. Affirming the Maine's Supreme Judicial Court's decision in this case would elevate Maine's interest in not paying out funds from its treasury over the federal interest in fair treatment of public employees and also other objectives, which would be a clear abrogation of the Supremacy Clause in the name

of state sovereignty.

C. Affirmance of the lower court's decision in this case would have far-reaching consequences throughout the United States. It would result in inconsistent and disparate enforcement of the FLSA by state governments, effectively nullifying the protections and remedies available to state government employees in those States, such as Maine, which have invoked or could invoke sovereign immunity to bar employee lawsuits. It could also negatively impact other federal regulatory statutes applicable to and enforceable against the States.

In *Jacoby*, *supra*, the Arkansas Supreme Court addressed the issue of nationwide uniformity:

> There is, of course, a uniformity consideration inherent in the principle of supreme law of the land. If the matter is left to the individual states to determine whether state sovereign immunity offers state employers sufficient protection, the result may well be a patchwork quilt of FLSA enforcement with some state courts permitting FLSA claims against state employers and other state courts declining to do so.

962 S.W.2d at 777. In addition to Arkansas, appellate courts in Iowa, Maryland, New Mexico, and New York have relied on *Hilton* and the Supremacy Clause and have ruled that the Eleventh Amendment is inapplicable to state court actions under the FLSA.[12] On the other hand, in addition to Maine, state courts in New Jersey, Wisconsin, and Ohio have expanded *Seminole Tribe* and the

[12] *Raper v. State of* Iowa, No. CL-678918 (District Court for Polk County, October 23, 1997), *Bunch v. Robinson*, 122 Md. App. 437, 712 A.2d 585, 595, (Md. Ct. Spec. App., 1998), and *Whittington v. State of New Mexico Dept. Of Public Safety*, Docket No. 19,065 (N.M. Ct. App., September 3, 1998).

Eleventh Amendment to apply to lawsuits by public employees under the FLSA, barring the lawsuits on sovereign immunity grounds.[13] Disparate enforcement has already become a reality.

Precluding judicial enforcement of public employees' rights under the FLSA, whenever a state government invokes immunity, would effectively nullify those rights in that State, notwithstanding the authority of the U.S. Department or Labor to investigate for violations and to bring suit under the concurrent jurisdiction provided in 29 U.S.C. § 216. Any assertions that the Department of Labor could take over the responsibility for bringing all of these lawsuits against States, which are or would be brought by affected public employees, strain credibility and are completely unfounded, due to serious resource constraints. In fact, in 1971, when a majority of state and local employees were not covered by the FLSA, in *Employees v. Missouri Public Health Department*, *supra*, the Solicitor General argued in an *amicus* brief that less than 4% of the employing establishments then covered by the FLSA could be investigated by the Labor Department. 411 U.S. at 287. Clearly, the Wage and Hour Division of the Labor Department is not positioned to take over investigative and enforcement responsibilities for all alleged violations by state governments, as well as private sector enterprises, of the wage and hour provisions of the FLSA, because of clearly inadequate resources for that purpose.

Allowing some states to effectively bar such lawsuits, in order to escape the FLSA wage and overtime pay provisions, could have far-reaching and highly undesirable consequences for the supremacy of other Federal laws. Such a decision could create an insurmountable obstacle for individuals in an uncertain number of States (invoking sovereign immunity) to vindicate their Federal

[13] *Allen v. Fauver*, No. ESX-L-3302-94(N.J. Super. Ct., February 17, 1998), on appeal to N.J. Sup. Ct. Law Division, *Keller v. Dailey*, No. 97A-PEOS-658 1997 WL 781897 (Ohio App. 10 Dist., December 16, 1997), and *German v. Wisconsin Dep't of Transportation*, No. 96-CV-1261 (Wis. Ci. Ct., March 8, 1997).

statutory rights, arising from any regulatory law passed under any of Congress's Article I powers, if such a law provides for equitable or monetary enforcement actions against the State. Hence, any other federal laws applicable to state governments could effectively be nullified in such States because of the absence of state judicial enforcement through private causes of action, whenever sovereign immunity is invoked. It is inconceivable that the uniformity of federal law, and thus the full force of the Supremacy Clause, could long survive if this Court affirms the Maine court's decision.

CONCLUSION

For the foregoing reasons, *amicus curiae* National Association of Police Organizations urges the Court to rule, first, that the FLSA divested the States of some of their sovereign powers under the Tenth Amendment; second, that the Eleventh Amendment does not apply and therefore does not bar actions filed by state employees in state court to vindicate their rights to overtime pay under the Fair Labor Standards Act; third, that the Supremacy Clause of the Constitution requires state courts to hear such FLSA cases; and, fourth, that the Supremacy Clause preempts invocations of sovereign immunity by a state, where they would pose a serious obstacle to the execution and administration of the FLSA. Therefore, *amicus curiae* respectfully requests that the Court reverse the judgment of the Maine Supreme Judicial Court.

Respectfully submitted this sixth day of January 1999.

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